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1954. A motion for rehearing was denied on August 10, 1954. The petition for a writ of certiorari was filed on August 27, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that petitioner's unreported illicit receipts were taxable income.

2. Whether it was error to exclude testimony of petitioner's accountant as to the extent of petitioner's claimed liability to Stokely-Van Camp Company.

3. Whether the trial court erred in refusing petitioner's requested charge as to the necessity that additional taxes be found owing.

4. Whether petitioner was placed in double jeopardy by a second trial after the discharge of a hung jury.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes * * * gains or profits and income derived from any source whatever. * * *
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 22.)
>
> SEC. 145. PENALTIES.
>
> * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on January 17, 1952, on two counts of willful attempted evasion of income tax. The first count related to his individual income taxes for the calendar year 1946 (R. 2–4). The second count concerned the corporate taxes of the Mar Meat Company, Inc., a Missouri corporation of which petitioner was president (R. 4–5). The case was tried before a jury which found the petitioner guilty as charged on count one of the indictment on Otcober 21, 1953 (R. 300). The corporate evasion charge was dismissed by the trial court at the conclusion of all the evidence (R. 324). Petitioner was sentenced to prison for a period of fifteen months and fined

$5,000 (R. 318). The Court of Appeals affirmed.

The first count of the indictment, on which petitioner was convicted, alleged that he wilfully attempted to defeat and evade a large portion of the income tax owing by him for the calendar year 1946 by filing a false and fraudulent return stating that his net income for the calendar year was $36,253.30, with tax due thereon of $15,437.17, when, as he well knew, his correct net income was $70,678.83, on which an income tax of $39,405.52 was owing (R. 2–3). In support of this charge the Government's proof showed that petitioner was in the wholesale meat and meat boning business, operating until November 4, 1946 (R. 107), under the name of Mar Meat Company (R. 94, 95). The business was incorporated and income was reported by the corporation, Mar Meat Company, Inc., on the basis of a fiscal year beginning November 1, 1946, and ending October 31, 1947 (R. 26–27). Petitioner's 1946 individual income tax return was prepared, without an audit (R. 23), by a certified public accountant from a single-entry set of books (R. 21). These books were kept by one Jost who posted regular printed and numbered invoices (R. 95, 97).

In 1946 petitioner began the systematic practice of recording certain meat sales on unnumbered dray tickets (R. 95–97), and these, by arrangement with petitioner, his bookkeeper did not enter as sales in the single-entry books (R.

97, 106, 208, 218). The examining agents of the Internal Revenue Service audited petitioner's proprietorship books and records with reference to his 1946 return of income (R. 104) and found that numbered invoices and recorded sales corresponded with his individual income tax return (R. 106). But certain dray tickets and unnumbered invoices were not recorded (R. 106). The same was found with reference to the records and returns of Mar Meat Company, Inc., for the fiscal year beginning November 1, 1946 (R. 107). Customers were canvassed (R. 104) and on the basis of their testimony and records introduced by the Government (R. 107–111) petitioner's correct net income for 1946 was shown to be $66,549.86 as compared with $36,253.30 shown on the petitioner's return (R. 112, 119). On the corrected net income a tax of $37,457.45 was owing (R. 119).

The defense explanation, as stated by the trial court (R. 308–310), was that petitioner had a contract to bone beef and pork carcasses for the Stokely-Van Camp Company (hereinafter called Stokely), to ship the boned product to that company, and to store and sell for the account of Stokely such by-products of the boning operations as bones, suet, kidneys, skin, shank meat, or joints and tenderloin. Without authority from Stokely, petitioner appropriated tenderloin stored for Stokely and converted it to hamburger which he

sold for his own account (R. 309). False reports were sent to Stokely to cover the appropriations of their by-products (R. 309). The unnumbered dray tickets discovered by the Government agents were admittedly used to acknowledge receipt of payments from customers for the admittedly unrecorded sales of the meat product made from the wrongfully converted Stokely by-products (R. 309–310). The jury was instructed to consider as income taxable to petitioner only what they found to be the proceeds of the sale of the new product, hamburger, created from the appropriated Stokely by-products (R. 276).

ARGUMENT

1. Petitioner contends that the decision of the court below is in conflict with *Commissioner* v. *Wilcox,* 327 U. S. 404. He asserts that the proceeds in the form of money derived from the sale of meat products created from meat by-products of the Stokely-Van Camp Company constitute embezzled funds, and hence are not taxable under the rule of the *Wilcox* case.

Petitioner is in error, however, in assuming that the facts here are identical with those in *Commissioner* v. *Wilcox, supra.* He did not take his employer's money. He did take meat (the available amount of which he had falsified to his bailor), changed it to another product entirely (hamburger), sold it and retained the proceeds in his right for his own use and benefit. The pro-

ceeds of this action to petitioner were not subject to replevy or summary appropriation by the bailor, the Stokely company. Even under the test of the *Wilcox* case, *supra*, the gain to petitioner was taxable. There was both (1) a claim of right, sufficient to establish taxability, resulting from the acquisition of the monies in such manner that those monies were not the property of anyone save himself, and (2) no definite unconditional obligation to turn over the monies to Stokely, although there may have been an inchoate liability to respond in damages. Cf. *National City Bank* v. *Helvering*, 98 F. 2d 93 (C. A. 2d) (gains from fraudulent overcharges on oil purchased for taxpayer's principal); *Akers* v. *Scofield*, 167 F. 2d 718 (C. A. 5th) (gains from swindling); *Currier* v. *United States*, 166 F. 2d 346 (C. A. 1st) (unlawful dividend); *United States* v. *Chapman*, 168 F. 2d 997 (C. A. 7th) (unlawful "black market" gains); *United States* v. *Iozia*, 104 F. Supp. 846 (S. D. N. Y.) (proceeds of sale of property wrongfully appropriated by a bailee); *Rollinger* v. *United States*, 208 F. 2d 109 (C. A. 8th) (protection money exacted on false pretenses); and *Briggs* v. *United States*, decided by the Court of Appeals for the Fourth Circuit on July 28, 1954 (1954 C. C. H., par 9551), petition for certiorari filed August 26, 1954, No. 306, this Term (proceeds from fraudulent land sales by seller's agent). Petitioner's post-indictment efforts at purgation (R. 193–201) do not affect his

they sent a note to the court that they were unable to agree on a verdict (R. 18, 301). The trial judge, after expressing regret that they were unable to agree and noting the time and expense involved, both to the Government and the defendant, carefully inquired as to the numerical division among the jurors (R. 18). The foreman responded giving not only the numerical division but also how the jurors were divided, eight guilty, four not guilty (R. 18, 301). The judge thereupon discharged the jury, without making further efforts to urge the jury to attempt to reach agreement (R. 19). In these circumstances, petitioner contends that his second trial, resulting in his conviction, placed him in double jeopardy.

He concedes, however, that if a jury becomes hopelessly deadlocked, the trial judge may in his sound discretion discharge the jury without giving rise to double jeopardy at a subsequent trial (Pet. 25). As the Court of Appeals noted, the trial judge specifically stated in his memorandum dismissing the plea of double jeopardy that the original jury was discharged on July 6, 1953, because the court was informed that the jury was unable to agree on a verdict (R. 301). Although petitioner disputes the accuracy of such finding, the court below correctly found that the record furnishes ample support for the trial court's statement of what had occurred at the first trial. In these circumstances it would appear that the plea of double jeopardy was properly rejected.

United States v. *Perez*, 9 Wheat. 579; *Wade* v. *Hunter*, 336 U. S. 684.

CONCLUSION

The decision of the court below is correct and presents no conflict. The petition for writ of certiorari should be denied.

Respectfully submitted.

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